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1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Ted Olson is a Gardener Aide and permanent employee of Respondent Department of Social and Health Services (DSHS). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on November 27, 2000.

2.2 Prior to the incidents giving rise to this appeal, Appellant was a Waste Treatment Plant Operator (WTPO) 2 for Consolidated Support Services (CSS) at Lakeland Village. By letter dated October 27, 2000, Tom Bumgarner, Administrator for CSS, notified Appellant of his demotion from WTPO 2 to Gardener Aide for neglect of duty and gross misconduct. Mr. Bumgarner alleged that on April 8, 2000, Appellant failed to properly position a valve at the Lakeland Village Waste Water Treatment Plant which resulted in 44,000 gallons of digester sludge being released into the plant and that he falsely reported the time and cause of the release. Mr. Bumgarner further alleged that Appellant failed to comply with the supervisory expectation that he vacuum the secondary clarifier at the plant.

Digester Release:

2.3 CSS employed two WTPOs. They were responsible, in part, for monitoring operations at the Lakeland Village treatment plant, which included taking samples, conducting standard lab tests, and recording test results and plant information on a daily log sheet. In addition, they were

1 responsible for advising their supervisor of any maintenance, operational or safety problems that
2 occurred at the plant.

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4 2.4 Appellant worked Saturday through Tuesday from 6:45 a.m. to 5 p.m. The other WTPO,
5 Keith Kopp, worked Tuesday through Friday from 6:45 a.m. to 5 p.m.

6
7 2.5 Mr. Kopp worked on April 7, 2000. He conducted lab tests and recorded the results on the
8 daily log sheet. Mr. Kopp's test results did not show that anything abnormal was occurring in the
9 plant. On April 8, 2000, Appellant arrived at the plant at approximately 8 a.m. At approximately
10 8:15 a.m., Gardener David Richardson and Appellant engaged in a general conversation outside of
11 the primary clarifier. Mr. Richardson did not smell a septic odor.

12
13 2.6 After talking to Mr. Richardson, Appellant began his work at the plant. He conducted lab
14 tests and recorded the results. Appellant's test results did not show that anything abnormal was
15 occurring in the plant. However, Appellant observed that the level of the primary digester was low
16 and that the material in the primary filter, the lagoon and the primary and secondary clarifiers was a
17 brownish color which indicated to Appellant that contents from the digester had been released into
18 the plant.

19
20 2.7 Appellant attempted to determine the cause of the digester release and proceeded to pump
21 the contents of the primary clarifier into the digester. Appellant had difficulty getting the pumping
22 to start in spite of the valves appearing to be in the proper positions. Nonetheless, Appellant
23 manually manipulated the valves.

1 2.8 Appellant left the plant at 11:30 a.m. to go to lunch. He had lunch off campus with Mr.
2 Richardson. During their lunchtime conversation, Appellant did not mention the abnormality at the
3 plant.

4
5 2.9 After lunch, Appellant returned to the plant, observed that the brownish color was not as
6 dark, and continued to pump the contents of the primary clarifier into the digester. Because
7 Appellant had difficulty getting the pumping started, he only managed to pump material for
8 approximately 45 minutes. Mr. Richardson returned to the plant between 1 and 2 p.m. and mowed
9 the lawn. Mr. Richardson did not observe or smell anything out of the ordinary.

10
11 2.10 At approximately 3 p.m., Bob Rasmussen, General Repairer, came to the plant. Appellant
12 told him that when he came to work in the morning, he found the digester level down. Mr.
13 Rasmussen noticed a strong sewage smell coming from the plant. Mr. Rasmussen and Appellant
14 proceeded to walk around the plant and check on the appearance of material passing through the
15 system. Mr. Rasmussen observed that the material had an abnormal dark, greasy appearance. Mr.
16 Rasmussen and Appellant discussed whether the duty officer had been notified. Mr. Rasmussen
17 was surprised that Appellant had not called the duty officer but felt that it was Appellant's
18 responsibility to make that call.

19
20 2.11 DSHS Wastewater Treatment Plant Operators guidelines require operators to immediately
21 report to management any problem that brings the plant out of compliance with its wastewater
22 treatment plant permits. The guidelines further require operators to notify management when any
23 problems arise. Appellant reported the April 8, 2000 plant problems to management on Monday
24 morning, April 10, 2000.

1 2.12 Throughout the events of April 8, the discharged material was contained within the plant.
2 No material was discharged onto the ground or outside of the plant. The release did not result in
3 any harm to the treatment process, the environment, or the public health and welfare. There is no
4 evidence that the release cause the plant to be out of compliance with its wastewater treatment plant
5 permits.

6
7 2.13 After Appellant reported the problem, management attempted to determine how the release
8 occurred. After engaging in fact finding and conducting tests on the plant, management determined
9 that the release would have occurred if a check valve failed or if Appellant had mispositioned a
10 valve. Management concluded that the most likely scenario was that Appellant mispositioned a
11 valve before he went to lunch and that he discovered the release after he returned to the plant.

12
13 2.14 If Appellant had mispositioned a valve, the release would have occurred within a matter of
14 an hour or more. However, a preponderance of the credible evidence establishes that the volume of
15 the release would have been less than 44,000 gallons. In addition, if Appellant had mispositioned a
16 valve, released material would most likely have been found on the ground, the sample test results
17 would have shown a dramatic change in temperature and chemical levels, and the volume of
18 material in the clarifiers and lagoon would have increased, none of which occurred.

19
20 2.15 Processing of material in the digester is a biological process while a chemical process treats
21 the material in primary clarifier. If a check valve malfunctioned and was partially stuck open,
22 material from the digester could seep into the primary clarifier over an extended period of time
23 before the clarifier began to show anything abnormal. A preponderance of the credible testimony
24 establishes that a stuck check valve is not an uncommon occurrence in treatment plants. We find
25 that the digester release was most likely caused by a stuck check valve and most likely occurred
26 over an extended period of time.

1
2 *Vacuuming of Secondary Clarifier:*

3 2.16 After the April 8, 2000 discharge, Appellant's supervisor, Dave Bratton, called the
4 Department of Ecology. On May 10, 2000, Otis Hampton of the Department of Ecology visited the
5 plant and made number of recommendations. Mr. Bratton put Mr. Hampton's recommendations in
6 writing and provided a copy to each of the treatment plant operators.

7
8 2.17 The first direction in Mr. Bratton's May 11, 2000, memo states: "WWTP LV Order
9 necessary equipment to vacuum secondary sludge and pump to headwork's (sic) do this as often as
10 needed to prevent nitrification in secondary and to produce a cleaner effluent." The memo did not
11 prioritize the task, did not specify who was to perform the task, and did not set forth timelines for
12 completion of the task.

13
14 2.18 On May 11, 2000, Keith Kopp ordered the vacuum and on May 16, 2000, Appellant
15 received it. After the vacuum was received, it required some plumbing alterations so that it could
16 be used to vacuum secondary clarifier.

17
18 2.19 Appellant met with Mr. Bratton on May 30, 2000. During this meeting, Mr. Bratton again
19 told Appellant that the secondary clarifier needed to be vacuumed to the headworks. Following the
20 meeting, Appellant created a "to do list" that he shared with Mr. Kopp. The Appellant's May 30,
21 2000, list included the vacuuming task.

22
23 2.20 On June 6, 2000, Appellant and Mr. Kopp met with a plumber who fitted the vacuum to a
24 pump so that it could be used on the plant. Mr. Kopp spent 2.5 hours on June 16 vacuuming the
25 secondary clarifier. Appellant was off work from June 7 until July 17, 2000. On July 19 and 22,
26 Appellant vacuumed the secondary clarifier.

1
2 2.21 John Thompson, Maintenance Manager, conducted the investigation into both instances of
3 alleged misconduct. On May 23, 2000, he produced an investigative report addressing the digester
4 release and on August 14, 2000, he produced an investigative report addressing the vacuuming of
5 the secondary clarifier. During his interviews with Appellant, Mr. Thompson felt that Appellant's
6 answers were vague and inconsistent. He also felt that Appellant's explanation of a stuck valve
7 causing the digester release was not valid.

8
9 2.22 Tom Bumgarner met with Appellant and determined that in both instances, Appellant
10 committed misconduct. Mr. Bumgarner determined that the digester release occurred because
11 Appellant failed to properly position a valve, that he falsely reported the time and cause of the
12 release, and that he failed to comply with his supervisor's expectation that he vacuum the secondary
13 clarifier. Mr. Bumgarner concluded that Appellant was minimizing the severity of the digester
14 release, that he misrepresented, recanted and revised his version of the events surrounding the
15 release, and that he attempted to cover up the release by not reporting it to the duty officer. In
16 regard to vacuuming the secondary clarifier, Mr. Bumgarner concluded that Appellant's supervisor
17 had given him specific direction and that Appellant failed to perform the task as expected.

18
19 2.23 Prior to determining the level of discipline to impose, on September 12, 2000, Mr.
20 Bumgarner held a pre-termination meeting with Appellant. In addition, he considered Appellant's
21 work history and the fact that Appellant was an experienced and certified treatment plant operator.
22 Mr. Bumgarner found that Appellant had been reprimanded in September 1999 for causing a
23 digester spill when he improperly propped open a check valve. In October 1999, Appellant was
24 counseled for failing to adhere to supervisory direction and for failing to accomplish his assigned
25 tasks. In February 2000, Appellant was reprimanded for failing to follow supervisory directions. In
26 spite of the seriousness of Appellant's misconduct, Mr. Bumgarner felt that Appellant was a valued

1 employee. However, he concluded that Appellant should be placed in a position of less
2 responsibility and where the consequences of his actions would have a lesser degree of potential
3 liability for the institution. Therefore, Mr. Bumgarner demoted Appellant to a newly created
4 Gardener Aide position.

6 **III. ARGUMENTS OF THE PARTIES**

7 3.1 Respondent argues that Appellant mispositioned a check valve before he went to lunch and
8 when he came back a couple hours later, the plant was polluted. Respondent contends that
9 Appellant is not willing to take responsibility for his misconduct, that he failed to correctly position
10 a check valve, and that he was not forthcoming about the circumstances that lead to the digester
11 release. Respondent argues that following the release, Appellant acted contrary to policy when he
12 failed to immediately report the problem. Respondent contends that Appellant is attempting to
13 cover up the truth, that he mispositioned the check valve, and then deliberately failed to report the
14 problem. In addition, Respondent contends that Appellant failed to comply with his supervisor's
15 expectations in regard to vacuuming the secondary clarifier. Respondent argues that Appellant
16 cannot be trusted in a critical position and contends that the level of discipline was appropriate.

17
18 3.2 Appellant argues that it was impossible for 44,000 gallons of material to be released from
19 the digester into the clarifier as a result of anyone mispositioning one valve. Appellant further
20 argues that during the timeframe determined by the appointing authority, 44,000 gallons of materials
21 could not have been released into the digester. Appellant asserts that more likely than not, a check
22 valve was clogged or stuck open and the digester material discharged over an extended period of
23 time, possibly weeks. Appellant contends that Respondent failed to prove that he caused the
24 digester release by mispositioning a check valve. Appellant further contends that the plant was not
25 out of compliance with its permit and therefore, it was not necessary for him to immediately report
26 the problem to the duty officer. Appellant asserts that he acted appropriately when he reported the

1 problem to his supervisor the first thing Monday morning. Appellant argues that he did not fail to
2 comply with his supervisor's expectation that he vacuum the secondary clarifier because his
3 supervisor did not prioritize the task, did not set a deadline for completion of the task, and did not
4 specify that Appellant and not Mr. Kopp was to complete the task. Appellant contends that
5 Respondent failed to prove that he engaged in misconduct and therefore, his appeal should be
6 granted and he should be fully reinstated to his Water Treatment Plant Operator 2 position.

8 IV. CONCLUSIONS OF LAW

9 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
10 herein.

11
12 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
13 the charges upon which the action was initiated by proving by a preponderance of the credible
14 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
15 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
16 Corrections, PAB No. D82-084 (1983).

17
18 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
19 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
20 of Social & Health Services, PAB No. D86-119 (1987).

21
22 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
23 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

24
25 4.5 Respondent failed to prove that Appellant was responsible for 44,000 gallons of digester
26 sludge being released into the plant. It is undisputed that some material was released into the plant.

1 More likely than not, the release resulted from a malfunctioning check valve. Furthermore,
2 Respondent failed to prove that it was possible for 44,000 gallons of sludge to be released during
3 the timeframe in question. More likely than not, the release was the result of a gradual seeping of
4 material over an extended period of time.

5
6 4.6 Respondent has failed to prove that Appellant did not comply with his supervisor's
7 expectation regarding the vacuuming of the secondary clarifier. Neither Mr. Bratton's May 11,
8 2000 memo nor Appellant's May 30, 2000 "to do list" identifies a priority, a deadline or a specific
9 person responsible for completion of the assignment. Appellant went on leave the day after the
10 vacuum was fitted with a pump. He worked on the task upon his return to work. Appellant should
11 not be held accountable for failing to accomplish a task that was not specifically assigned to him
12 and that did not include a reasonable timeline for completion.

13
14 4.7 Respondent has met its burden of proof that Appellant should have reported the digester
15 release to the duty officer. WTPOs are responsible for advising their supervisor of any
16 maintenance, operational or safety problems that occur at the plant. CSS guidelines require
17 problems to be reported when they arise. Appellant did not report the problem as required, rather
18 he waited two days before reporting the problem.

19
20 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to
21 the facts and circumstances including the seriousness and circumstances of the offense. The penalty
22 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
23 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.
24 An action does not necessarily fail if one charge is not sustained unless the entire action depends on
25 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

1 4.9 Appellant failed to comply with the CSS guideline and therefore, disciplinary action is
2 appropriate. However, under the proven facts and circumstances of this case, demotion to a
3 Gardener Aide position is too severe. In this case, a fifteen-day suspension is sufficient to prevent
4 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.

5
6 **V. ORDER**

7 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Ted Olson is granted in part
8 and the disciplinary sanction of demotion is modified to a fifteen-day suspension.

9 DATED this _____ day of _____, 2001.

10 WASHINGTON STATE PERSONNEL APPEALS BOARD

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13 _____
Gerald L. Morgen, Vice Chair

14
15 _____
Leana D. Lamb, Member